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Office of the Secretary
Federal Communications Commission
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In the Matter of Rules and Regulations Implementing
the Telephone Consumer Protection Act of 1991
CG Docket # 02-278

I am pleased to provide the FCC with my comments on revisions to the TCPA, in as close as possible to the order they were presented in the Sep. 12, 2002 Notice of Proposed Rulemaking, with the FCC's proposal notice numbering/lettering section noted where possible for coordination.

Background, Experience and Interest of Commenter Michael C. Worsham, Esq.

Michael C. Worsham is a public interest attorney practicing in Maryland and the District of Columbia. I have litigated cases in all three main areas of the TCPA, live sales call solicitations, prerecorded voice solicitations, and junk faxes, including as well TCPA class actions. A case I brought established a private right of action in Maryland state courts under the TCPA, *Worsham v. Nationwide*, 139 Md. App. 487 (2001).

I was an invited participant on the FTC's panel on Prison-based telemarketing during public hearings on the FTC's Telemarketing Sales Rule during 2002. My article on the TCPA will appear in the next issue of *Trial Reporter*, the legal journal of the Maryland Trial Lawyers Association. Through my practice and website I get numerous calls and e-mails regarding unwanted solicitations of all sorts. I am a member of the National Association of Consumer Advocates, the Maryland Consumer Rights Coalition, and Private Citizen, Inc., although these comments are my own. My interest in the TCPA and FCC regulations is effectively stopping unwanted solicitations to myself, my clients, and many other people who receive unwanted solicitations. These comments are meant to help make the TCPA's rules as effective as possible.

1. Company-Specific Do-Not-Call Lists - **[Proposal Section II. (B)(1)(a)]**

As is apparent to anyone in the U.S. with a telephone, the company-specific do-not-call (DNC) list approach adopted by the FCC contradicts the clear wish of Congress for a national DNC list, and has clearly failed to meet the TCPA's goals. It has resulted in the daily invasion of the privacy of tens of millions of Americans on a massive, persistent and widespread scale for over 10 years. It has also forced many state legislatures to spend much time to address a problem that they would not have had to if the FCC had simply followed Congress's expressed wish.

To a small extent, compliance with DNC requests may have increased lately. However, this has been drowned out by the advances in technology, especially predictive dialers, as well as the pre-recorded solicitations in which a person can not make a DNC request and often does not even know who made the call. The FCC's proposal for a national DNC list is many years too late, and should be implemented forthwith.

Here is an example of how bad the problem is just from my own experience. For several years I have been on as many DNC lists as I can, including the list periodically sent out by Private Citizen, Inc. to hundreds or thousands of telemarketers, and the Direct Marketing Association's lists. I have filed over a dozen lawsuits in my own name against telemarketers, and have a reported TCPA case bearing my name, *Worsham v. Nationwide Insurance Co.*, 138 Md. App. 487 (2001). Despite all this effort, just during the week I prepared these comments in Nov. 2002, I have received several unwanted telemarketing calls, including hang-up calls both with and without Caller ID, and prerecorded voice solicitation calls insisting that I respond within 24 hours for a 4day/3night travel deal in Florida. Since the FCC granted a comment period extension, I received another prerecorded solicitation for carpet cleaning with the Caller ID blocked, which violates Maryland law. For others who do not get active I know the problem is much worse.

This past month's calls also included two calls from Cingular Wireless made from a call center in India, despite my DNC request during the first call. The first caller refused to give me their phone number until I waited for a supervisor to get on the line. The second caller was evasive about the fact he was calling from India, trying to infer he was in a call center in Cincinnati through which the call to me was routed. He also responded to my pointing out I had just told them the day before not to call by asserting that this was a new offer for a different free cell phone, as if that justified their failure to respect my DNC request. Needless to say, Caller ID was unavailable. A national DNC list would have avoided all this, as well as the lawsuit I will probably have to file against Cingular unless they change their policy.

The TCPA required the FCC to "prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraphs in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers." 47 U.S.C. § 227(c)(2). The spectacular failure of the company-specific regime demonstrates that if the FCC has not already violated this section of the statute, it will do so by continuing this failed regime. There has been a dramatic increase in sales of the Tele-Zapper and Caller ID for screening out telemarketer calls, devices and services for which the consumer

pays - costs explicitly prohibited in the TCPA section just recited. Even with, and certainly absent these new techniques and devices for which consumers pay, the company-specific regime has failed, contrary to the explicit terms of the statute to develop regulations to effectively and efficiently accomplish the goals of the TCPA. Simply put, the FCC's failure to adhere to the Congressional mandate to implement efficient and effective regulations to protect consumer privacy has forced in consumers to pay for their privacy, contrary to the TCPA's goals.

There is nothing preventing a company-specific regime to exist in addition to a national DNC list. If the FCC chooses to keep the company-specific regime, it should clarify that a request by a consumer to be "taken off the list" should be interpreted by a telemarketer to put that consumer's telephone number on that company's DNC list. I believe telemarketers will respond to such a request literally, by taking the person's number off whatever list happens to be in front of that telemarketer at that particular instant, but not place the number on the company's DNC list, which is in fact the intent of the both the consumer and the TCPA.

As alluded to above, the DMA's DNC list does not work. The FCC could help by clarifying that a DNC request transmitted through a third party agent, such as Private Citizen, Inc. or even the DMA, must be honored by telemarketers. Ten years is a reasonable minimum time for DNC requests to be honored, both for company-specific and a national DNC list.

The FCC should also require that when a written DNC policy is produced as required by the Commission's regulation, 47 C.F.R. § 64.1200(e)(2)(i), that the entity on whose behalf it is produced is clearly identified. I have received a DNC policy in the mail which is only identified by the name of the telemarketing call center, not the entity on whose behalf the call to me was made, which is the entity on whose behalf the policy is being produced and the entity that I would recognize. Others have indicated they received DNC policies in the mail for which they could not tell what company the policy was supposed to represent.

Interplay between sections 222 and 227

The FCC's tentative conclusion is correct and reasonable. There is no conflict between section 222 and 227. Section 227 and the FCC's rules at 64.1200 both distinguish between different methods of contact - live sales call, automated or pre-recorded call, and fax. Similarly with sections 222 and 227, the Commission's discussion recognizes that honoring a section 227 DNC request does not render a section 222 consent into a nullity, but only limits the manner of contact. *Central Hudson* is not even implicated in the interplay between these two sections. Requiring a company to honor a section 227 DNC request is justified by the substantial government interest in preventing unwanted telephone intrusions into private homes, a restriction which courts have upheld.

2. Network Technologies - [Proposal Section II. (B)(1)(b)]

Call blocking

Verizon indicated to me that any residential subscriber can block calls that appear on Caller ID as “Private” or “Anonymous” by pressing *77, and that there is no charge for this service, which can be undone by pressing *87. However this will not block calls that are “Unavailable” or “UNKNOWN CALLER” on Caller ID, which is how many telemarketing calls appear. Verizon indicated their \$5/month “Call Intercept” service would block out these “Unavailable” calls. The FCC should require the telecommunication companies to make available for free a service that blocks “Unavailable” calls, in this or a separate rulemaking.

Caller ID

Requiring telemarketers to transmit Caller ID information is second only to creating a national DNC list as a needed priority to protect consumer privacy.

The FCC is well aware that major telemarketing call centers can and do locate in areas or use trunk lines where Caller ID is not transmitted. Even if the FCC created a rule which prohibited the blocking or altering Caller ID information, these call centers would not be effected, since they do not block Caller ID - it is simply not a part of the system they use.

States such as Maryland have already passed laws prohibiting Caller ID blocking. Md. Ann. Code, Public Utility Companies Art., § 8-205. However, this law has had no practical or observable effect. I still continue to get hang-up calls on a regular basis that appear on Caller ID as “Unavailable” or “Unknown Caller” (depending on the display programmed for the particular Caller ID unit). Even if the existing Maryland law, or a new FCC rule, included a private right of action for such violations, it would be extremely difficult to prosecute such violations. Verizon will not do a search for incoming calls without a minimum payment of \$500 for a limited search window. Without this search, an “Unavailable” hang-up call simply can not be identified. It is very difficult to get either the phone company or police to put a trap on a phone line. The FCC should look into requiring common carriers to retain incoming call records for at least some minimal period of time for persons seeking to identify callers or prove that certain calls were made.

Information is power, and Caller ID is no exception to this rule. The FCC should require all telemarketers to transmit Caller ID information. The FCC’s Sep. 12, 2002 notice states that with certain exceptions, common carriers using Signaling System 7 (SS7) functionality are required to transmit calling party number associated with interstate calls. This requirement should be extended to non-common carriers engaged in telemarketing, and to intrastate calls. There is no reason why a telemarketer or a company wishing to engage in telemarketing can not be required to locate in an area and/or purchase or lease equipment which will transmit Caller ID information. If absolutely necessary, existing large call centers could be allowed a grace period within which they must fully convert to equipment capable of transmitting Caller ID.

The FCC rules should also clarify that states are not prohibited from crafting stricter Caller ID

requirements for intrastate calls, such as a requirement for Caller ID information should the FCC decide not to require this.

3. Autodialers - [Proposal Section II. (B)(1)(c)]

Definition

The term “automatic telephone dialing system” is a broad term that should, as the FCC suggests, include any equipment that dials number automatically, whether by producing random numbers or by sequentially dialing numbers fed into the equipment from a database. Congress was concerned about automated calls, regardless of a hyper-technicality of how they were dialed. Had Congress intended a more narrow meaning, it would have used different terms such as “random telephone dialing system” or “sequential number dialing system.” However, Congress choose instead to include these two more narrow terms as part of the broader statutory term.

The effect of the TCPA’s ban on auto-dialed calls to emergency phone lines, health care facilities, pagers and cell phones on the impending wireless number portability is that telemarketing can no longer be done using random number auto-dialing without inevitably violating the TCPA by calling a cell phone or other restricted number. The telemarketer will have to comply with the law by not making random auto-dialed calls. There is no or little interest for the telemarketer in contacting random numbers anyway.

Autodialed Calls to Residences and Businesses

War dialers

War-dialing is already prohibited by the FCC’s rules, but the prohibition should be made more explicit. War-dialing, trolling, or casting is made for the ultimate purpose of encouraging the purpose of property goods and services, and are thus “telephone solicitations” under the TCPA and FCC rules. Since the war-dialer calls do not provide identification, and are often made late at night in contrast to the FCC’s time restrictions, the calls violate 47 C.F.R. § 64.1200(e)(1) and (2)(iv). I have spoken to several people who have been victims war dialers which called them late at night or in the early morning hours, often on a repeated basis.

I have also spoken to persons who were contacted by dozens of the angry victims of war-dialing who mistakenly thought these persons were responsible for the war dialer calls, simply because the person’s name would up on the victim’s Caller ID display. These persons were subjected to harassment and even death threats, thereby becoming secondary victims of war dialers, even though they had nothing at all to do with or control over the war dialer. These persons could sometimes tell what exchange the war dialer had been calling based on the numbers of the people who were calling them (albeit mistakenly) to complain or make threats. Sometimes the war dialer would stop for awhile, but then start up again a few months later, resulting in another round of harassment, confusion and problems for all involved. I can provide the FCC with affidavits from these people regarding the nightmares they have endured due to

war dialers.

An Ohio appellate court looked carefully at the issue raised by war dialers of automated equipment making calls to search out prospective numbers. In *Irvine v. Akron Beacon Journal*, 2002 Ohio App. Lexis 39 at 23-25, the court found this practice violates the TCPA:

There is no language in the statute requiring that a conversation take place or that a sales representative be at the other end of the line. As the Irvines argued in opposition to Beacon Journal's motion for directed verdict, the mere ringing of the phone could constitute a violation. Section 227(a)(3), Title 47, U.S. Code, as quoted above, refers to the "initiation" of a telephone call, not the completion of one. . . . The fact that these particular calls were one step removed from the actual sales pitch does not mean that the purpose of the calls was not to, ultimately, attempt to sell a subscription to the Beacon Journal . . . Whether a solicitor is at the other end of the phone or not, when the telephone rings, the intrusion into the home and the seizing of the telephone line is the same. In fact, an argument can be made that when the telephone rings and no one is on the other end, the recipient is even more disturbed and inconvenienced than if a sales person is at the other end of the line.

The FCC has authority under 47 U.S.C. § 227(c) to prohibit war dialer calls, since they are made as part of a solicitation for subsequent faxes or telephone solicitations. The FCC must ban war-dialing in unambiguous terms in its revised rules.

Predictive Dialers

A predictive dialer falls within the broad statutory definition of "automatic telephone dialing system," for the reasons mentioned above. Therefore predictive dialer calls are subject to the ban on calls to emergency lines, health care facilities, paging services, and services in which the called party is charged. A predictive dialer used to make "telephone solicitations" which abandons a call or hangs up also violates the FCC's regulations requiring identification.

A predictive dialer abandonment rate of zero is the only level consistent with Congressional intent and the TCPA and FCC rules. Footnote 102 in the FCC's proposal suggests an over-reliance by the FCC on industry information. The FCC cites the DMA for the proposition that predictive dialers "allow telemarketers to better target customers most likely interested in telemarketing offers." Actually, what predictive dialers do is increase the efficiency of the computer system or equipment that makes calls by being an electronic battering ram. These machines do not target or have the ability to target customers based on interest. The way you target those persons (ostensibly) 'most likely interested' is by acquiring, selecting or using data: lists of people by demographic, geographic, psychographic, financial, lifestyle, etc. characteristics. Predictive dialers can not do this and have nothing to do with 'targeting' the solicitation. Predictive dialer's do nothing more than call over and over and over, with the resulting disruption and harassment.

In addition, it was not a goal of the TCPA to allow smaller telemarketers to compete with larger telemarketers by using automated equipment that shifts the burdens and costs of doing business to the innocent people who get predictive dialer hang up calls. Footnote 103 of the FCC's Notice impliedly recognizes the harassment inherent in predictive dialer hang up calls by noting that a Caller ID requirement for predictive dialers allows consumers "to hold telemarketers accountable for their practices." The intentional practice of abandoning of calls likely has its greatest effect on elderly people, who may be less attuned to modern practices and technology, and coupled with often fading memories, simply do not know or understand what is happening. This causes confusion, stress, and even fear, as well as the obvious nuisance of answering numerous phone calls that have no caller on the other end.

The use of a percentage figure in the context of predictive dialer calls is misleading. It hides the reality that even a seemingly small abandonment rate when expressed as a percentage, like 1%, still means millions of people are getting nuisance and completely pointless hang-up calls that invade their privacy and piece of mind. Although a Caller ID requirement on predictive dialers will help, and should be implemented, this still shifts the burden to the private individual to call the telemarketer, and of course, Caller ID is not free.

Many telemarketers operate successfully without predictive dialers. If a telemarketer can not stay in business without deliberately and regularly hanging up on people as part of its business practice - which is precisely what a predictive dialer with a non-zero abandonment rate does - then that company simply should not be in the business of telemarketing.

Answering Machine Detection

Answering Machine Detection (AMD) is somewhat of a technological variation of predictive dialers, at least in the sense that it contributes to illegal hang up calls. As the FCC proposal notes (paragraph 27), AMDs can hang up on a person who answers the phone. I believe AMDs are used in this fashion to deliver prerecorded messages only to answering machines. Recently a person in charge of marketing for a resort area told me he believed that prerecorded solicitation calls were legal if they were delivered to an answering machine, as opposed to a live person. I believe the public is starting to recognize the dead air delay as a result of telemarketing equipment, and resents it, even if they do not know the terms "predictive dialer" or AMD.

4. Identification Requirements - [Proposal Section II. (B)(1)(d)]

"Hang up" solicitation calls which fail to identify the caller already violate the FCC's regulation which requires identification of the caller, entity on whose behalf the call is made, and a phone number or address to contact the caller. 47 C.F.R. § 64.1200(e)(2)(iv). These calls also violate the FTC's Telemarketing Sales Rule, and state consumer protection laws that require identification, such as in Maryland. Md. Ann. Code, Commercial Law Art. § 13-301(10).

The FCC's rulemaking should make it absolutely crystal clear for the regulated

community that ‘hang up’ calls, whether a result of a predictive dialer, answering machine detection equipment, a human dialer, or any other means, violate the Commission’s rules, and include a specific regulation to this effect. These calls promote no legitimate business or commercial speech interest, since no speech is actually transmitted. These calls only result in disturbance and invasion of privacy by machines used by businesses simply as a way to cut their own labor costs, adversely impacting not only consumers, but also to the detriment of businesses that market legitimately.

I provide an example of a recent variation of hang up calls on my web site, <http://www.worshamlaw.com/telemarketing.htm>. This illustrates how a company deliberately makes hang up calls with the intent of using the recipient’s Caller ID as an ad display for the caller. This is an outrageous practice and should be stopped by the FCC. The FCC’s rules should state that transmittal of Caller ID information does not relieve a telemarketer of the duty to provide clear identification of both the individual caller (first and last name) and the calling entity.

The FCC should explicitly apply the existing identification requirements to otherwise lawful artificial or prerecorded messages. A blanket requirement for anyone delivering calls with an autodialer to provide identification is a simple, even handed, and easy rule to understand. Attempting to determine whether one’s calls are commercial but do not transmit an unsolicited advertisement, or whether an established business relationship at the time the call is made exists can be thorny. If an autodialer, even used in an otherwise lawful manner, repeats calls or goes haywire in some manner, an ID requirement will at least allow a person to contact the person in charge of the autodialer.

Political Calls

An ID requirement or enforcement of existing requirements is sorely needed to address auto dialed political calls. Companies boast on internet sites of being able to make millions of political calls at a moment’s notice for political campaigns. The number of such auto dialed political calls is increasing. I received several during the Nov. 2002 campaign, and got a complaint from a woman specifically about these types of calls, as opposed to commercial calls. One of my clients in a heavily targeted area in Maryland mentioned getting ‘loads’ of these calls during the Fall 2002 campaign.

If there is authority for it, the FCC’s rules should also require senders of political calls to honor DNC call requests, whether made via a company-specific request or a national DNC list. If not, the FCC should at least require these calls to meet the identification requirements of 47 U.S.C. § 227(d)(3), and the autodialer requirements of 47 U.S.C. § 227(b)(1) which prohibit autodialed calls to pagers and cell phones.

Debt Collector Calls

The FCC should clarify the requirements and potential for liability for pre-recorded debt

collector calls. Specifically, debt collector calls, even if they do not contain an unsolicited advertisement, should nonetheless be subject to the identification requirements of 47 U.S.C. § 227(d)(3). These calls do not always, as the FCC asserted, arise from an established business relationship. A debtor may have a relationship with a creditor, but has no relationship with debt collectors, who buy and sell debts like a commodity. Also, these calls may very well be made by an autodialer, contrary to the FCC's assertion that this is never the case.¹ The FCC's 1992 discussion of this point references a non-existent 47 C.F.R. § 64.1200(e)(4) of its rules.

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692b addresses debt collectors communicating for the purposes of acquiring location information. The FCC should either ban the use of autodialed or prerecorded voice calls for this purpose, or require that such calls include either a phone number or address. By definition, an autodialed or prerecorded voice call can not be interactive. There is no point in a debt collector delivering a prerecorded voice message that only identifies the caller, without any call back number, address or identification of the company. In any event, even with a phone number or address, such prerecorded calls from debt collectors to third parties may only be made once in order to conform with 15 U.S.C. § 1692b(3).

5. Artificial or Prerecorded Voice Messages - **[Proposal Section II. (B)(1)(e)]**

Commercial and Non-commercial Calls - [II. (B)(1)(e)(i)]

The TCPA already prohibits prerecorded messages that offer free goods or services, or free estimates or analyses, or to sell or market a business product, or to give away free prizes from a radio station. Congress defined both “telephone solicitation” and “unsolicited advertisement” in broad terms. 47 U.S.C. § 227(a)(3) and (4). An “Unsolicited advertisement” includes “any material advertising the commercial availability or quality of any property, goods, or services” transmitted without prior permission. 47 U.S.C. § 227(a)(4).

Live calls or prerecorded messages need not offer something for sale to nonetheless still have advertised the commercial availability or quality of a product or service. Regardless of what carefully chosen words are used in these messages to obfuscate their underlying commercial purpose, it is clear that the true purpose of these calls is not for charity or political purposes. The radio station offering a free prize is trying engage and entice the listener to avail themselves of the station's service of over the air music and programs, in order to increase the number of listeners, get higher ratings, and ultimately charge higher advertiser fees. Although the existing Congressional language is adequate, the FCC could explicitly state the application of the TCPA to these types of calls in its new rules.

Tax-exempt Nonprofit Organizations - [II. (B)(1)(e)(i)]

¹ 1992 Report and Order, FCC 92-443, paragraph 39, Oct. 16, 1992.

The FCC went beyond the language of the TCPA by attempting to exempt calls made not just by tax-exempt nonprofit organizations, but also attempted to exempt calls made on behalf of such organizations. This creates a loophole for commercial telemarketers, including for-profit telemarketers that in many cases keep well over 50% of the money gained through the calls made on behalf of the non-profit organization. The FCC should clarify that calls made jointly by for-profit and non-profit are subject to the same restrictions as calls made solely by a for-profit entity.

The FCC should look at a study by the Field Research Corp.: “The California Public's Experience with and Attitude Toward Unsolicited Telephone Calls” (March 1978), especially Table II-1. About 65% of the people polled found calls soliciting money for charity annoying or worse. Even though people found these calls less annoying than commercial solicitations, the fact is that a majority of people find even charity telemarketing calls to be annoying. The annoyance would surely be higher if people knew that a for-profit telemarketer was actually making the call, and keeping a majority of the money collected. The annoyance factor is also likely higher today than when this study was done.

Established Business Relationship - [II. (B)(1)(e)(ii)]

The FCC exceeded its statutory authority by attempting to exempt from the ban on prerecorded voice solicitation calls those calls made where an “established business relationship” exists. There is no need for the FCC to define the EBR term, and the FCC’s EBR definition is overly broad by any reasonable standard. For example, it includes - and thereby ostensibly exempts - a “relationship” based solely on a product inquiry, or a “relationship” even where no consideration was exchanged. This is an absurd definition at odds with common sense and the intent of the statute. If the need arises, the EBR language can be interpreted on a case by case basis by a court, just like any other phrase in the TCPA which the FCC has not similarly tried to define.

In litigation I have had opposing parties or counsel assert an EBR defense to sending unsolicited fax advertisements in a variety of situations. In one recent case this EBR defense was raised based on attendance at a seminar or conference four years earlier. This, despite the fact that for faxes, there is no EBR exemption in either the statute or in the FCC regulations. The FCC’s new rules should dispel this EBR defense myth among fax broadcasters and telemarketers.

If the FCC insists on maintaining a definition of EBR, at a minimum, the words “inquiry, application ” should be deleted from the existing definition. Simply asking for information, directions, store hours or similar questions in no way constitutes the express permission which the TCPA explicitly requires prior to sending prerecorded voice solicitations. Also, the words “or without” should be deleted from the section of the FCC’s definition “with or without an exchange of consideration.”

At least one court in Ohio has explicitly ruled that a request to not be called terminates any business relationship for purposes of the TCPA. *Charvat v. Dispatch Consumer Services, Inc.*, 769 N.E.2d 829 (2002). To hold otherwise would force people to accept unwanted phone calls simply to engage in commercial transactions. To force people to submit to unwanted prerecorded voice solicitations in their home simply to buy a product would violate the U.S. Constitution. The FCC should not attempt to reverse this logical and legal precedent.

EBR and Prerecorded Calls with an Unsolicited Advertisement

An EBR issue not specifically raised in the FCC's notice bears discussion and clarification. The TCPA allowed the FCC to exempt certain calls from the ban on prerecorded messages. 47 U.S.C. § 227(b)(2)(B). The subsections and sub-clauses of this section make it potentially unclear as to whether a prerecorded voice calls containing an 'unsolicited advertisement' as defined by the TCPA are allowed simply because an EBR may exist between the parties.

The language of 47 U.S.C. § 227(b)(2)(B)(ii)(II) means that even prerecorded calls otherwise exempted by the FCC as not adversely affecting privacy rights (such as calls that are not commercial, calls that do not transmit any unsolicited advertisement, or calls involving an EBR) are still prohibited if they also "include the transmission of any unsolicited advertisement."

The FCC should clarify that prerecorded voice calls made without prior express consent are prohibited if they transmit any 'unsolicited advertisement' even if they are sent between parties with an established business relationship at the time of the call. To hold otherwise would allow the FCC's broad definition of EBR to facilitate prerecorded voice calls containing an 'unsolicited advertisement' and made without prior consent to impact privacy in a fashion not intended by Congress.

6. Time of Day Restrictions - [Proposal Section II. (B)(1)(f)]

To reach the TCPA's goal of disturbing the least amount of people, the calling hours should be limited to the day hours when a majority of people are still not at their residence. While the work world has changed since the FCC's rules were passed 10 years ago, a majority probably still adheres to 'normal' business hours during the day. Some telemarketers plan their calling around this reality, and leave taped messages on answering machines during the day. However, it is now prudent for the FCC to protect residential privacy in the 6-9 PM "dinner time" hour by banning solicitations during this time period in its new rule.

7. Unsolicited Facsimile Advertisements - [Proposal Section II. (B)(1)(g)]

As discussed earlier, the FCC should explicitly prohibit war-dialers used to troll or search for new fax numbers or phone numbers.

The FCC should also clarify what constitutes adequate identification in fax "headers." For instance, "Beach Travel" is not adequate to identify "Coral Beach Travel and Tours." (From

an actual fax header and sender). Also, initials alone are not adequate. Thus “C.D.” is not adequate to identify “Cell Direct” as the sender of a fax. (Another actual example).

An important clarification that is needed from the FCC is to clarify that a multi-page unsolicited advertisement sent in a single fax transmission can constitute more than one TCPA violation, if each page of the multi-page fax independently constitutes an “unsolicited advertisement” as defined by the TCPA.

Prior Express Invitation or Permission - [II. (B)(1)(g)(i)]

The Commission’s discussion here fails to emphasize that the full operative phrase in the statutory definition of “unsolicited advertisement” is “prior express invitation or permission.” 47 U.S.C. § 227(a)(4) (emphasis added). Any permission granted must be express, and recognition of this fact renders it unnecessary to consider the examples of *implied* permission suggested in the FCC’s rules or discussion.

The FCC could clarify one point raised by the practices of one large fax broadcaster that in numerous court cases has claimed blanket permission was given to it to send faxes on behalf each of any of the broadcaster’s numerous clients. The FCC should clarify that such alleged permission is not express permission under the TCPA unless each client of the fax broadcaster is specifically and individually identified prior to any such permission given. Verifiable authorization or confirmation records of any such permission, at least as strong as envisioned by the FTC,² should be obtained and kept by the fax broadcaster. The fax broadcaster’s own handwritten notes are not, and should not be considered, verifiable authorization or confirmation records of prior express permission. Independent confirmation in writing from the future recipient of faxes must be generated and maintained by the fax broadcaster or entity asserting proper express permission was given to send faxes.

Established Business Relationship - [II. (B)(1)(g)(ii)]

The FCC suggests that its attempt to create an EBR exemption for unsolicited fax advertisements in its 1995 Reconsideration Order “has amounted to an effective exemption from the prohibition on sending unsolicited facsimile advertisements.” There is no authority in the TCPA for the FCC to enact substantive regulations regarding unsolicited fax advertisements contrary to the clear statutory language. The only authority in the TCPA for FCC rules related to faxes is 47 U.S.C. § 227(d), which allows the FCC to promulgate rules on technical standards only.

² *Telemarketing Sales Rule, Notice of Proposed Rulemaking*, Federal Trade Commission, 67 Fed. Reg. 4492, 4520 (Jan. 30, 2002).

There simply is no such EBR fax exemption in the statute, or any authority for the FCC to create such an exemption, directly or by way of discussion or suggestion in an opinion or order. The strong language of the statute is clear. This was explained thoroughly in the class certification order in *Kondos v. Lincoln Property Co. et al.*, Case #00-8709-H, Dallas County, Texas, 160th Judicial Dist. (July 12, 2001):

Here, the FCC's interpretation of the EBR defense would act to amend the TCPA's definition of unsolicited advertisement from a fax sent without the recipient's "prior express invitation or permission," to a fax sent without the recipient's prior express *or implied* invitation or permission. That interpretation conflicts with the plain language of the statute.

Moreover, Congress did expressly provide an established business relationship exclusion in the provisions of the TCPA dealing with telephone solicitations, *see* 47 U.S.C. § 227(a)(3). "Where Congress includes particular language in one section of a statute and but (*sic*) omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (citations omitted). With respect to faxes, then, in contrast to telephone solicitations, Congress intended to limit the effect of prior invitation only to *express* invitations; the FCC's interpretation would effectively delete that limitation from the statute. The Court cannot support an interpretation that reverses the effect of the words chosen by Congress. Accordingly, the Court holds that there is no "EBR" or "implied permission" exception to the definition of unsolicited advertisement for faxes.

Kondos at 4-5 (emphasis in original). Other courts have reached the same conclusion. *Girards v. Inter-Continental Hotels Corp.*, Case # 01-3456-K, Dallas County, Texas (April 10, 2002) expressly rejecting the idea of an EBR exemption to sending unsolicited fax advertisements. *See also Biggerstaff v. Website University.com*, Case # 00-SC-86-4271, Charleston County, S.C. (March 20, 2001).

What is most needed now is for the FCC to rescind and undo its confusing dicta that has lead fax broadcasters, advertisers and senders to believe there is an EBR exemption to sending unsolicited fax advertisements. There is no exemption in the statute, and court decisions have accordingly held so.

Fax Broadcasters - [II. (B)(1)(g)(iii)]

The FCC should clarify that any entity that provides fax or telephone numbers to be used for fax or telephone solicitations determined to have violated the law are liable for the violations for their role as having engaged in a high degree of involvement or actual notice of an illegal

use. This applies regardless of the name used, such as ‘fax broadcaster.’”

Similarly, any entity that is given notice that its goods or services are being used in a way that violates the act should be held liable. For those with actual notice or involvement, liability should extend to include companies that provide ‘opt-out’ or ‘removal’ numbers often printed at the bottom of unsolicited fax ads, even if the company is a separate company from the entity actually sending out the unsolicited fax advertisements. Liability should also include the call centers which are reached by calling a toll-free number on the fax, and which often perform the ‘removal’ or ‘opt-out’ function, and certainly must have knowledge of the illegal faxing.

Others and I have experienced calling these toll free call center numbers, and receiving evasive, deceptive or hostile responses (including hanging up) regarding unsolicited faxes. It is clear in many or most cases that these persons do know about the illegal nature of the faxes at issue, even if their primary function may be order-taking. They continue to profit by taking orders generated through illegal faxing, but until now have probably escaped liability.

Companies that sell automated dialing equipment with the knowledge (i.e. actual notice) that the equipment will be used in violation of the TCPA should be held liable, even if they arrange to have a separate entity provide the numbers (whether phone or fax numbers) dialed by this equipment. There are a large number of “work at home” solicitations being made in which the sellers of the equipment must know that the intended use will be illegal. I have spoken with one person making these calls for a well known work at home enterprise who, although apparently not aware herself of the illegality, indicated she and others were given names of companies to buy this equipment from and encouraged to do so. Liability should also include those involved in arranging “war dialing” equipment and lines used for illegal faxing.

The FCC should specifically remind and hold liable common carriers who provide the phone lines and T1s if they have actual notice of an illegal use.

8. Wireless Telephone Numbers - [Proposal Section II. (B)(1)(h)]

The FCC should not attempt to rewrite the statute to relieve telemarketers from the prohibition on using autodialers or making prerecorded voice calls to pagers and cell phones. Since some people use cell phones for security reasons, it would be improper and an invasion of privacy for the FCC to create or adapt an IVR or other system which would allow telemarketers to identify or distinguish cell phone numbers. The practical effect of the TCPA ban on most marketing calls to cell phones, coupled with wireless number portability, is that telemarketers will have to manage and use true opt-in lists, which is the way things really should be. Until now I have only litigated one case where a paging company delivered a pre-recorded call to a cell phone of my client. Calls to cell phones seems to be slowly increasing, and will surely increase once portability takes place.

The FCC should make clear that autodialed or prerecorded voice calls to pagers or cell phones are illegal even if no charge is accrued for that particular call. That means that

unsolicited text messages sent to a cell phone are illegal under the TCPA, even if the recipient incurs no added charge for that unsolicited text message. Marketers should be deterred from shifting from sending unsolicited calls to text messages to cell phones. The disruption is very similar, and dangerous, given the still prevalent use of cell phones by people in their cars and other vehicles.

9. Enforcement - [Proposal Section II. (B)(1)(i)]

Private Right of Action and Individual Complaints - [II. (B)(1)(i)(i)]

Although it would help private enforcement, I do not see any statutory authority for a private right of action for a single phone call that violates 47 U.S.C. § 227(c)(5). This section requires more than one telephone call within 12 months before a private right of action accrues. It is distinguished from a single phone call in violation of 47 U.S.C. § 227(b)(1) which is immediately actionable.

However, the FCC can help the private enforcement of the TCPA by clarifying certain issues involving private enforcement of 47 U.S.C. § 227(c)(5). Court opinions have been split over scenarios where once the two-call threshold has been reached, whether a person has a private right of action for the first call made in violation of the TCPA or regulations, or only for the second call (or further additional calls). *Worsham v. Nationwide*, 138 Md. App. 487 (2001). Courts have also been split over whether a person has a private right of action for multiple violations arising out of a single call, or only has a private right of action for a single violation per call. *Id.* The FCC should clarify that once the statutory threshold of two calls received in violation of the law within one year has been met, all violations in any calls made to the same number, including the first call, and multiple violations arising from any of these calls, are all actionable by private citizens.

The FCC should also clarify that 47 C.F.R. § 64.1200(e) was promulgated pursuant to FCC authority under both 47 U.S.C. § 227(b)(3) and § 227(c)(5). Private actions under 47 U.S.C. § 227(b)(3) are actionable immediately, and do not require a second call within a 12 month period. Clearly an illegal prerecorded voice solicitation made at 2 AM is a worse invasion of privacy and should give rise to a cause of action both for the illegal nature of the prerecorded call in violation of 47 U.S.C. § 227(b)(1)(B), as well as for the annoying and illegal time it was delivered under 47 C.F.R. § 64.1200(e)(1). If this prerecorded voice call also fails to provide identification, as many prerecorded voice calls fail to do, that would be a third violation actionable by a private citizen under 47 C.F.R. § 64.1200(e)(2)(iv).

The FCC should extend the informal complaint rules to entities other than common carriers. My sense is that most telemarketers are not common carriers. Only two of the dozens of law suits I have filed have involved a common carrier as a defendant. Effective enforcement will be increased if telemarketers who are not common carriers feel the combined enforcement effect of both private suits and a requirement to respond to the FCC's informal complaint process. Some telemarketers will consider a small private action as a cost of doing business. However, the spotlight of FCC attention will surely increase compliance.

State Law Preemption - [II. (B)(1)(i)(ii)]

The Congressional intent is strong and clear enough in 47 U.S.C. § 227(c) to create federal preemption over the field of telemarketing restrictions, particularly with respect to a national DNC list. The only exception is 47 U.S.C. § 227(e), which allows states to enact more restrictive intrastate laws. Thus, the national DNC list envisioned by the FCC does and should preempt weaker state DNC lists.

Several state DNC lists are riddled with exceptions and loopholes. FCC preemption over these weak state lists would have two benefits. First and foremost, it meets the statutory goal of protecting consumer privacy. Secondly, it could relieve telemarketers from having to comply with separate state DNC list requirements. Compliance with the FCC list should be deemed adequate to meet the goals and requirements of any weaker state DNC list.

The FCC should study all existing state DNC lists, and create a national DNC list that is at least as strong and protective of consumer privacy as the strongest or most protective provisions of existing state laws and lists. This would allow the FCC national DNC list to preempt all state DNC lists, relieving telemarketers from having to comply with all existing state lists. It would also ensure that the FCC has thoroughly studied the issue and adopted the most protective measures for consumers from around the country.

The Commerce Clause and 47 U.S.C. § 227(e) limit state regulation to intrastate laws or regulations. The language of 47 U.S.C. § 227(e) suggests Congress intended the TCPA to be the floor below which states could not go, whether for intrastate or interstate telemarketing regulation. I suspect that state laws are generally not written in a manner to distinguish whether they regulate intrastate or interstate telemarketing. The FCC should preempt all weaker state laws, including weaker laws regulating intrastate telemarketing calls, whether or not those state laws explicitly distinguish their intended target as being the regulation of intrastate calls.

Stronger FCC Enforcement of the TCPA is needed

FCC enforcement over TCPA violations was non-existent until a few years ago. The FCC did not issue a single citation for telemarketing violations under the TCPA until Dec. 18, 2001, less than one year ago, and a full 10 years after the TCPA was passed. The FCC has not issued a single notice of apparent liability and no forfeitures to date for telemarketing solicitations, the prime focus of the TCPA, despite massive, widespread and ongoing violations nationwide. The FCC citations issued have focused almost exclusively on pre-recorded voice solicitations, not live sales telemarketing.³

³ The FCC's July 18, 2002 citation to Ad Resources, Inc. d/b/a Dining and Shopping Spree, EB-02-TC-132, is the only citation issued for violations of a consumer's DNC request.

In over 10 years since the TCPA was passed, the FCC has assessed only six penalties (forfeitures) for unsolicited faxes, and these six were all issued in the last three years. *See* <http://www.fcc.gov/eb/tcd/ufax.html>. The FCC has apparently not collected anything from any of the six forfeitures. The FCC did not even issue its first citations for unsolicited faxes until July 12, 1999 (Get-Aways, Inc, Tri-Star Marketing and others), over seven years after passage of the TCPA, and did not issue the first forfeiture until March 2, 2000 (to Get-Aways, Inc.).

The need for vigorous TCPA enforcement by the FCC was demonstrated by the Separate Statement of Commissioner Kathleen Abernathy when the FCC issued its Forfeiture Order. EB-00-TC-011, Oct. 12, 2001 against US Notary, Inc., which hinted at the FCC's lack of serious enforcement to date:

“For the sake of consumers and the entities we regulate, it is imperative that we enforce our rules vigorously and dependably. Otherwise, we simultaneously ignore our statutory duty to uphold the public interest and leave a cloud of doubt over how seriously this Commission takes its rules.”

Citizens, private attorneys, and state attorney generals simply can not keep up against the tide of telemarketers and junk faxers - which now can include anyone with a personal computer and a cheap CD of numbers easily available off the internet or retail stores like Best Buy.⁴ Large telecommunications companies do not help enforcement,⁵ and in fact, aid telemarketing, if not violations of the law. Verizon and others encourage telemarketing by selling marketing data, and then profit again by charging consumers for Caller ID services, which these same companies pitch to the consumer as a way of monitoring telemarketers, even though they know many or most telemarketers do not transmit Caller ID information. Strong and consistent FCC enforcement is sorely needed.

10. National Do-Not-Call List - [Proposal Section II. (B)(2)]

The FCC should adopt a national DNC list in conjunction with the FTC that allows for joint enforcement by the FCC, FTC and state attorney generals. The need for this privacy protection is more than adequate under the *Central Hudson* standard. The regulated industry will benefit, rather than lose, by efficiencies gained by not calling persons who do not wish to be called, a goal stated by the telemarketing industry.

⁴ I have successfully sued a local business whose owner was sending unsolicited faxes from a personal computer in this fashion.

⁵ During 2002 Bellsouth refused to honor a subpoena from a Maryland court.

The FCC can not exempt for-profit telemarketers ostensibly calling on behalf of tax exempt non-profit entities. Although existing FCC regulations and the proposed national DNC list can not cover calls made by a tax exempt nonprofit organization, they do and will cover calls made by a for-profit telemarketer on behalf of a tax exempt nonprofit organization. Thus, the only potential conflict with the proposed FTC national DNC list is how to apply such a list to calls made by a tax exempt nonprofit organization. The FTC proposes to include such calls, whereas the TCPA exempts such calls. 47 U.S.C. § 227(a)(3).⁶ The solution is that all tax exempt nonprofit calls are covered by a combined FCC-FTC list, with the only difference being that calls made by a tax exempt nonprofit entity to a number placed on the national list would not be actionable for a private citizen.

Concurrent company-specific regime and national DNC list

There is no reason why the FCC can not maintain the company-specific regime in addition to having a national DNC list. Many companies are already complying with what for them is a national DNC list - the Direct Marketing Association's list - as well as state DNC lists, while still subject to compliance with the FCC's current company-specific regime.

If the FCC maintains the current company-specific regime along with a national list, companies should process DNC requests within 24 hours or less, the amount of time they would typically process a sales or service order. A DNC request should be honored at least 10 years, preferably indefinitely, or until the telemarketer has conclusive confirmation that there has been a change in the subscriber to that number.

The FCC could require that a company affirmatively reply to or acknowledge a DNC request. If the FCC maintains its regulation requiring a company to produce a DNC policy on demand, any additional information the FCC chooses to require a company to provide should be required in conjunction with providing the DNC policy.

State Do-Not-Call Lists

Administrative costs would be duplicated, and consumer confusion would be increased by maintaining separate national and state DNC lists.

⁶ Note that even calls made by a tax exempt nonprofit organization would be prohibited if made using automated dialing system or artificial or prerecorded voice to a paging service or cellular phone. 47 U.S.C. § 227(b)(1)(A).

11. Other Miscellaneous Issues

Prerecorded Solicitations To Businesses

An issue not raised in the FCC's notice is pre-record voice solicitations to businesses. In 1992 the FCC choose not to implement the authority Congress provided it in the TCPA to prescribe regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice which the business has not consented to. 47 U.S.C. § 227(b)(2)(A).

Speaking as a person who operates a small business from my home, and knowing others who do likewise, I can state that this decision should be revisited. The technological changes noted in the FCC's notice were not limited to the telemarketing industry. Improvements in computers, fax machines and the internet has lead to many person operating businesses in whole or in part from their homes. When a home-based business person takes a day off, or is sick, telephone solicitations have the same disruptive effect as if the call was made to a person's home, even if the caller thinks they are attempting to reach a business. Even when not sick or taking a day off, it is pointless for a person running a home-based business to be forced to receive their 20th prerecorded voice call for a credit card charging device, simply because the FCC chose not to use the authority Congress gave it to stop this type of call.

A related issue the FCC's Notice raises is that cell phones are used by many for a variety of reasons, including both personal or business. It is thus increasingly difficult to distinguish personal from business phone uses and scenarios. The more protective approach is to apply the same restrictions to both business and residential phone lines. A ban on prerecorded voice calls to businesses would protect privacy for home-based businesses and nuisance for all businesses, and still allow marketers an opportunity to solicit businesses, including home-based businesses, using live sales representatives.

A lesser form of protection still consistent with the TCPA and within the FCC's authority would be to at least allow businesses to subscribe to the national DNC call list for purposes of stopping artificial or prerecorded voice solicitations. At a minimum this could be tried out for at least the two year trial period the FCC (and FTC) are contemplating for national DNC list implementation.

Calls From Outside the United States

My calls from India for Cingular Wireless is one example of calls or faxes made in or from other countries. These Indian callers spoke with an accent, and had suspiciously American sounding first names, suggesting to me that they were not their real names. No last name was given. Others have indicated to me that they have gotten calls from India for Providian, and for the Men's Warehouse. Another example of an call center in India is described at http://newstribune.com/stories/101602/sta_1016020924.asp. I have also received unsolicited faxes from Canada, including at 3AM in the morning, from a company called Infinite Promotions (Caller ID display) promoting internet domain name

registration services. When I called them, the person stated that he was laughing at me, and would not settle my TCPA claim, essentially saying “Come and get me in Canada,” and hung up. Interestingly, given the nature of what they were advertising, their own web site domain registration information was incomplete and/or false.

The FCC should emphasize in its rules that the TCPA applies to telemarketing solicitations and fax advertisements sent into the U.S. from locations outside the U.S. New Caller ID requirements should mandate that the true location of the origination of the call from India must be transmitted via Caller ID, or alternatively, at a minimum Caller ID must reflect any U.S. location the call is routed through and the caller must promptly identify the country they are calling from.

eFax and related technologies

The FCC should make clear that unsolicited advertisement faxes sent to eFax fax numbers and similar type services are illegal under the TCPA. While some of these services are free, not all are. For example, while eFax has a free service, but I pay a monthly fee for eFax, and may pay extra if the number of faxes received is over a certain limit. Both free and paid service accounts still have the disruption the TCPA was intended to stop: one must open the email, open the attachment, wait for the specialized software reader program to open, click through the advertisement (for free accounts), examine the ad, close several windows, and delete the ad.

CONCLUSION

I am very pleased the FCC is taking steps to improve its rules. I hope the FCC will seriously consider all of these comments of mine. Other persons may have endorsed these comments or parts of them in their own submissions to the Commission.

Sincerely,

Michael C. Worsham